BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CYNTHIA NALL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,529
MAIDS TO ORDER OF JOHNSON COUNTY	)	
Respondent	)	
AND	)	
	)	
TWIN CITY FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 11, 2006 preliminary hearing Order of Administrative Law Judge Steven J. Howard. Claimant was awarded benefits in the form of temporary total disability compensation and authorized medical care with Dr. John Ciccarelli.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment? Respondent contends that claimant failed to prove that she suffered the accidental injury alleged on September 6, 2005.

2. Did claimant provide timely notice of accident? Respondent argues that claimant failed to advise her supervisor of the alleged accident, even though there were numerous discussions regarding the fact that claimant suffered ongoing back pain. Respondent argues that claimant's back pain preexisted, with claimant advising her immediate supervisor, Natalie Scharf (the co-owner of respondent), that she had suffered back problems both in her teenage years and while working for Gordman's, a local department store. Respondent argues that claimant failed to advise her immediate supervisor of the date of accident and of the alleged incident, both in violation of K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be reversed.

Claimant alleges that she suffered accidental injury on September 6, 2005, while cleaning a bathtub. Claimant testified that she experienced an initial pop in her back and then the pain in her back gradually increased. Claimant testified that she told the co-owner, Natalie Scharf, of the incident, but acknowledged, on cross-examination, all she actually told Ms. Scharf was that she had knocked her back out of place. Claimant admitted that she did not discuss the bathtub incident with Ms. Scharf and did not request medical care at that time. Ms. Scharf and claimant did discuss medical treatment, as claimant had advised Ms. Scharf she had been to a chiropractor in the past. Ms. Scharf and claimant discussed Dr. Hammond, a local chiropractor, who also happened to be a client of respondent's in that respondent cleaned his offices. It is unclear from this record whether Ms. Scharf recommended Dr. Hammond or whether she and claimant simply discussed the fact that Dr. Hammond was a chiropractor.

Claimant continued working for respondent through October 31, 2005, at which time she quit working due to the pain.

Ms. Scharf testified that while she and claimant had regular discussions regarding claimant's ongoing back pain, there was never an allegation of a work-related incident nor a work-related connection to claimant's pain until November 22, 2005. Ms. Scharf acknowledged that it was on that date that claimant advised her of the work-related connection to her back injury.

The earliest medical documentation contained in this record is dated October 14, 2005, and was provided from the chiropractic offices of Martin T. Falukos, D.C. An October 14, 2005 document from Dr. Falukos' office indicates that claimant suffered sudden pain approximately two months before the October 14, 2005 examination. There is no indication in that document regarding the cause of claimant's complaints. The Information/Application For Care sheet from the Falukos Chiropractic Offices, also dated October 14, 2005, acknowledges that claimant was employed by respondent. However, the question "Is your condition due to an accident?" was marked "no." This document was signed by claimant.

The next medical reports contained in the record are dated December 1, 2005, and include a December 1 pain management report from the Shawnee Mission Medical Center Pain Management Center. This report, which is identified as the final report, indicates claimant was admitted to the emergency room with a one-month history of pain which "has worsened significantly over the last day." The document does indicate that claimant injured her back cleaning a bathtub approximately one month before and that the pain was progressive. A second record from Shawnee Mission Medical Center, which is identified

as the Emergency Room Record and is dated December 2, 2005, shows an admission date of December 1, 2005. That document indicates that claimant had been experiencing back pain off and on for approximately one month. The report also indicates claimant had been going to a chiropractor for manipulations and that her pain had worsened in the last 24 hours. The History and Physical form from Shawnee Mission Medical Center, dated December 1, 2005, notes that claimant was working for respondent, cleaning a bathtub, "when she fell forward." Finally, the office notes of December 7, 2005, which appear to originate from Dr. Ciccarelli (although that is not absolutely clear from this record), indicate that claimant was employed for respondent when, on September 6, while cleaning a bathtub, she felt and heard a pop in her back. The report indicates that claimant's condition has progressively worsened since that date, with pain into the right leg.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[1] The Board finds certain aspects of this case troubling. First, claimant failed to advise either Ms. Scharf (her immediate supervisor) or Shannon Hayes (her co-worker) of the bathtub incident contemporaneous with the accident. While claimant did discuss ongoing back pain, she never mentioned a specific date of accident or the mechanics of the accident. Additionally, claimant failed to request workers compensation benefits or any medical care from Ms. Scharf. Ms. Scharf testified that the required workers compensation notices were posted in the backroom, which she identified as the supply room where all employees go to obtain their supplies and return their supplies at the end of the day. However, claimant denied being aware of these workers compensation postings. Both Ms. Scharf and Ms. Hayes advised the first time they were made aware that claimant was alleging a work-related injury was on November 22, 2005. This was true, even though both agreed claimant complained of back pain regularly. The earliest medical records contained in this record, which are dated October 14, 2005, fail to designate a source of claimant's injury, simply indicating back pain with a two-month history. One question on the Information/Application For Care form from the Falukos Chiropractic Offices, which inquires whether the condition was due to an accident, was answered "no." In the section requesting how payment would be made, the workers compensation section was left blank and claimant marked that she would pay with a credit card. There is also no mention in any of the Falukos reports of the mechanics of the injury, with no comment regarding the involvement of a bathtub or a specific traumatic incident.

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[2]

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[1] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[2] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[3]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[4]

Claimant's allegation that she suffered an accidental injury on September 6, 2005, is not contradicted by this record sufficiently enough to cause the Board to reject her testimony. The ALJ, in reviewing claimant's testimony versus the testimony of Ms. Scharf and Ms. Hayes, apparently found claimant to be the more credible witness with regard to the accident. The Board will generally give some deference to an administrative law judge's determination of the credibility of the witnesses. In this instance, the Board finds that claimant has proven by the barest of margins that she suffered accidental injury on September 6, 2005, arising out of and in the course of her employment.

However, K.S.A. 44-520 requires that notice of accident "stating the time and place and particulars thereof" shall be given to the employer within ten days of the accident. K.S.A. 44-520 does acknowledge that actual knowledge of the accident shall render the giving of such notice unnecessary. Additionally, the statute provides that if the claimant's failure to provide timely notice was due to just cause, then the notice provisions of the statute will be extended to 75 days from the date of accident.

In this instance, claimant acknowledges discussing ongoing back pain with her immediate supervisor. The fact that claimant had a history of back pain was no secret to this employer. Claimant had discussed a serious back injury suffered when she was teenager and prior difficulties in standing for long periods of time while working for a local department store before she began her employment with respondent. However, during conversations contemporaneous with the injury, claimant failed to mention the bathtub incident to either her immediate supervisor or her co-worker. The initial medical records contained in this record fail to mention the bathtub incident. The first indication in this record of a mention of the bathtub incident does not occur in the medical reports until December of 2005. Those reports also contradict each other in that, in certain reports, claimant indicates that she fell, while, in other reports, claimant simply indicates she felt a pop in her back.

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[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[4] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

K.S.A. 44-520 requires that the notice given to the employer provides information regarding the time, place and particulars of the accident. The Board cannot find in this instance that claimant satisfied the requirements of K.S.A. 44-520 and finds that during conversations claimant had with her supervisor, claimant failed to discuss the bathtub incident. Both claimant's supervisor, Ms. Scharf, and claimant's co-worker, Ms. Hayes, testified that the first time they were provided an allegation of a work-related injury was on November 22, 2005, seventy-seven days after the alleged date of accident. Claimant has, therefore, failed to satisfy the requirements of K.S.A. 44-520 with regard to notice of accident, as well as with regard to any just cause for her delay in providing notice. While the Board notes claimant discussed a worsening of her condition, it also notes that this record is void of any attempt by claimant to modify her date of accident beyond the original September 6, 2005 date listed on her E-1 Application For Hearing and as discussed at the time of the preliminary hearing. The Board, therefore, finds that claimant has failed to satisfy the provisions of K.S.A. 44-520 and that timely notice of accident was not provided to this respondent. Therefore, claimant's request for benefits should be denied and the award of benefits by the ALJ should be reversed.

These findings are not binding upon a full hearing on the claim but shall be subject to a full presentation of the facts.[5]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Steven J. Howard dated January 11, 2006, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of March, 2006.

BOARD MEMBER

c: James F. Stanley, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[5] K.S.A. 44-534a(a)(2).